Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Cox Virginia Telcom, Inc.	)	
Pursuant to Section 252(e)(5) of the	)	CC Docket No. 00-249
Communications Act for Preemption	)	
of the Jurisdiction of the Virginia	)	
State Corporation Commission	)	
Regarding Interconnection Disputes	)	
with Verizon-Virginia, Inc. and	)	
for Arbitration	)	

MOTION TO STRIKE THE DECLARATION OF WILLIAM MUNSELL AND OTHER INAPPROPRIATE NEW MATTER

Cox Virginia Telcom, Inc. ("Cox") hereby submits this Motion to Strike the Declaration of William Munsell and Other Inappropriate New Matter in the above captioned proceeding. Continuing its insupportable practice in this proceeding, Verizon has included a substantial number of new factual allegations and claims in its Petition for Clarification and Reconsideration of July 17, 2002 Memorandum Opinion and Order (the "Verizon Petition"), in violation of the Commission's rules and the procedures adopted for this proceeding.[1] The new matter in the Verizon Petition includes a declaration by a Verizon negotiator, a proposal for new language concerning intercarrier compensation for "virtual" foreign exchange ("FX") traffic, and assorted new claims regarding the network architecture language the Commission adopted with respect to Cox. In its accompanying Opposition, Cox demonstrates that this new matter fails to provide

[1] This is the third time Verizon has forced Cox to object to the inclusion of inappropriate material in a submission to the Commission. *See* Objection and Request for Sanctions of Cox Virginia Telcom, Inc., CC Docket No. 00-249, filed November 7, 2001 (the "Cox Objection"); Motion to Strike Untimely Raised Issues Related to Issue I-5, CC Docket No. 00-249, filed August 7, 2001 (the "First Motion to Strike"). The Commission dismissed the Cox Objection as moot because Cox prevailed on each issue involving improperly submitted new material. *Arbitration Order*, ¶¶ 24-25. The Commission granted the First Motion to Strike to the extent that Verizon had attempted to broaden the scope of Issue I-5 through the submission of new contract language. *See* Letter Ruling from Jeffrey H. Dygert to Scott Randolph and Alexandra Wilson, dated August 17, 2001.

any grounds for reconsideration of the Commission's *Arbitration Order*.[2] In this Motion to Strike, Cox demonstrates that as a matter of basic fairness, this new matter should not even be considered and must be stricken from the record.

I. Introduction

On July 17, 2002, the Commission released its *Arbitration Order,* resolving the ten outstanding issues presented in Cox's Petition for Arbitration of its Virginia interconnection agreement with Verizon.[3] The Commission resolved nine of the issues in Cox's favor and rendered a split ruling resolving Cox and Verizon's dispute regarding intercarrier compensation for Internet-bound traffic. On August 16, 2002, Verizon filed its petition for reconsideration, explicitly requesting reconsideration of two issues related to direct end-office trunking (Issue I-4) and intercarrier compensation for "virtual" FX traffic (Issue I-6), and requesting "clarification" of several other contractual provisions governing network architecture adopted by the Commission for the parties' interconnection agreement.[4]

II. The Munsell Declaration Is Impermissible Under the FCC's Rules and Procedures for this Proceeding, and Must Be Struck.

In support of its request for reconsideration of the Commission's decision on Issue I-6, Verizon offers the Munsell Declaration to support its claim that the Commission erred in finding

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[2] *See* Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration; In the Matter of Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration; In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., *Memorandum Opinion and Order*, CC Docket Nos. 00-219, 00-249, 00-251, DA 02-1731 (Wireline Comp. Bur.) (rel. July 17, 2002) (the "*Arbitration Order*").

[3] *See* Petition for Preemption and Arbitration of Cox Virginia Telcom, Inc, CC Docket No. 00-249, filed December 12, 2000 ("Cox Petition"). One of the issues raised in the Cox Petition was settled.

[4] *See* Verizon Petition at 4, 5, 6-11, 15-23. The additional contractual provisions discussed in the Verizon Petition are Section 4.4.2, governing the location of the parties' interconnection points; Section 4.2.3, governing

that no method exists for reliably measuring "virtual" FX traffic.[5] Because Verizon's proposal required all traffic, including "virtual" FX traffic, to be rated according to the geographical end-points of the call, it was incumbent upon Verizon to provide a means of rating and measuring that traffic.[6] The Commission found that Verizon did not meet this burden.[7] The Munsell Declaration, intended to meet the evidentiary gaps the Commission identified in Verizon's case, is impermissible under the FCC's rules because it consists solely of information that Verizon had a full opportunity to develop and present at earlier points in this proceeding.[8] It also cannot be accepted under the procedures adopted for this proceeding.

A. The Munsell Declaration Is Impermissible Under the Commission's Rules Governing Petitions for Reconsideration.

Under Rule 1.106(c)(2), a petition for reconsideration may rely on facts not previously presented only if the "new" facts (1) have occurred since the last opportunity to present evidence; (2) could not, through ordinary diligence, have been learned prior to the last opportunity to present evidence; or (3) must be considered due to an overriding public interest.[9] The purpose of this rule is to "encourage[] applicants and others to provide complete information at an early stage, thereby minimizing the need for reconsideration proceedings."[10] As the

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compensation for transport between the parties points of physical interconnection and their designated interconnection points; and Section 5.2.4, governing the provision of direct trunks.

[5] Verizon Petition at 21-22, Exhibit 1, Declaration of William Munsell (the "Munsell Declaration"); *see also Arbitration Order*, ¶¶ 301-303.

[6] *Arbitration Order*, ¶ 286, 288.

[7] *See id.*, ¶ 301-303.

[8] *See, e.g.*, Barbour County Board of Education, *Memorandum Opinion and Order*, 12 FCC Rcd 11782, 11784 (1997); Marks CableVision and TCI CableVision of California, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 814, 818, 819-20 (2000) (citing *Colorado Radio Corp. v. FCC*, 118 F. 2d 24, 26 (D.C. Cir. 1941) (a litigant "[cannot] sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.")).

[9] 47 C.F.R. § 1.106(c)(2).

[10] *See* Carolyn S. Hagedorn, *Memorandum Opinion and Order*, 11 FCC Rcd 1695, 1696 (1996) ("*Hagedorn*").

Commission has explained, "a party who creates a partial record cannot supplement that record only after the initial decision specifies the particular respects in which it is deficient."[11]

Verizon does not even argue that its new evidence satisfies the standard laid out in Rule 1.106. Instead, it makes only the conclusory statement that "it is information developed after the hearing and it is in the public interest."[12] Neither of these bases is sufficient to support this new evidence. Initially, Verizon's decision to "develop[]" the traffic study described in the Munsell Declaration "after the hearing" does not justify its inclusion in this proceeding. Cox raised the issue of the feasibility of measuring the "actual originating and terminating points" of traffic in its petition for arbitration, its prefiled testimony, and its briefs on this issue, giving Verizon ample opportunity to provide contrary evidence.[13] Instead, Verizon offered only vague hearing testimony indicating that a traffic study theoretically could be designed to help implement Verizon's proposal, and then only when prodded by the Commission's staff.[14] Thus, the only reason the Munsell Declaration addresses information developed after the evidentiary stage of this case is because Verizon chose not to develop the information previously.[15] As demonstrated above, the FCC's rules forbid Verizon from using a petition for reconsideration to cure the gaps in its case.[16]

Moreover, the Munsell Declaration shows that the traffic study was conducted in February of 2002, a full five months before the *Arbitration Order* was released. If Verizon

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[11] *See id.* (citing Payne of Virginia, Inc., *Memorandum Opinion and Order*, 66 F.C.C.2d 633, 637 (1977) ("*Payne*")).

[12] Verizon Petition at 22 & n.49.

[13] *See* Cox Petition at 15; Cox Exhibit 1, Direct Testimony of Prof. Francis R. Collins, Ph.D. at 25; Initial Brief of Cox Virginia Telcom, Inc., CC Docket No. 00-249, filed November 16, 2001, at 38-40.

[14] *See* Tr. at 1811-14 (Pitterle).

[15] *Arbitration Order*, ¶ 302.

[16] *See Payne*, 66 F.C.C.2d at 637 (The important public interest in "orderly adjudicative processes and administrative finality . . . should not be sacrificed to consider additional evidence which seeks only to offset the party's oversight or lack of diligence . . .").

thought the information contained in the Munsell Declaration was relevant to the resolution of this issue, it had more than sufficient opportunity to submit it and allow the parties to examine and respond to it prior to the Commission's decision. Having failed to do so, Verizon has no right to have this information considered now. Because Verizon has failed to offer any justification for offering the Munsell Declaration that satisfies Rule 1.106, the Declaration must be rejected and stricken from the record.[17]

Additionally, the substantive deficiencies of the Munsell Declaration render it irrelevant, providing a separate basis for the Commission to strike it. The plainest shortcoming of the Munsell Declaration is that it does not describe actual traffic studies for "virtual" FX service, but rather describes only the performance of a traffic study on the traditional FX service offered by Verizon.[18] According to Verizon's hearing testimony, traditional FX traffic is treated as local traffic, whereas it desires "virtual" FX to be treated as toll.[19] The Munsell Declaration does not account for this difference.

Moreover, the Munsell Declaration does not address whether Cox or Verizon has the capability to perform all the traffic measurements required by Verizon's language, instead addressing only virtual FX.[20] Verizon's proposal would require all traffic – not just virtual FX – to be rated and billed based on the geographic end-points of the call. As Cox has demonstrated, and Verizon has admitted, there is no way for carriers to measure the geographic end-points of several types of calls besides virtual FX, including calls through a leaky PBX, calls to and from

[17] Verizon's bare assertion that some unidentified "public interest" justifies inclusion of the Munsell Declaration is without merit. Verizon does not identify what public interest inclusion of the Munsell Declaration would serve or how it would be served.

[18] Munsell Declaration, ¶ 5.

[19] *See* Tr. at 1816 (Pitterle).

[20] Even as to virtual FX traffic, the Munsell Declaration appears to make unreasonable assumptions, about the ability to distinguish such traffic from other types of traffic. *See* Opposition of Cox Virginia Telcom to Verizon's Petition for Reconsideration, CC Docket No. 00-249, at 38-39 (filed September 10, 2002) ("Cox Opposition").

off-premises extensions and calls to a company's local area network.[21] The Munsell Declaration provides no evidence that Verizon or any other carrier can measure these types of traffic. Without such evidence, however, the Florida traffic study cannot provide the Commission with a basis for reconsidering the adoption of Cox's language.

Even assuming that the information contained in the Munsell Declaration is sufficiently complete to be relevant, it contains no indication that Mr. Munsell – who is identified only as a Verizon negotiator – is qualified to offer an opinion on these matters. If Verizon intended to present the information in the Munsell Declaration as evidence, a declaration should have been provided by the person who performed the study, not someone who looked over that person's shoulder. In the end, therefore, the Munsell Declaration is really no evidence at all. It is irrelevant, and it and should be struck.[22]

B. Verizon's Submission of the Munsell Declaration Violates the Procedures for this Proceeding.

Even if the Munsell Declaration could be accepted under the standards of Rule 1.106, it would be barred because it violates the specific rules the Commission established for this proceeding. The Commission specified when and how parties could provide evidence, and the Munsell Declaration is being provided more than nine months after the last opportunity for rebuttal on this issue. Verizon was well aware of these constraints and easily could have conducted its traffic study prior to the close of the record in this proceeding. Therefore, Verizon

[21] *See* Second Revised Joint Decision Point List IV (Intercarrier Compensation), CC Docket Nos. 00-218, 00-249, 00-251 (filed November 5, 2001) at 22-23 (Verizon proposed language, §§ 1.60(a), 5.7.1)); *see also* Tr. at 1804-1811 (Pitterle).

[22] Philippine Telephone Co. v. International Telecom, Ltd., *Memorandum Opinion and Order*, 15 FCC Rcd 6009, 6016 (2000) (striking irrelevant material from response to Petition for Reconsideration).

deserves no consideration on this issue, and the Commission must maintain its control over this proceeding by striking the Munsell Declaration.[23]

Moreover, accepting the Munsell Declaration would violate Cox's rights to discovery and cross-examination. As explained in the Cox Objection, Cox has significant due process rights that would be throttled if Verizon were permitted to introduce new matter in violation of the specific rules for this proceeding.[24] In the case of the Munsell Declaration, Cox is deprived of, among other things, its rights to question and challenge Mr. Munsell; to have access to the traffic study to which he refers; and to provide rebuttal evidence and testimony establishing the deficiencies of the approach he suggests. Given the flaws in the Munsell Declaration described above, depriving Cox of these rights would give Verizon a significant advantage. Consequently, if the Commission were to reverse its decision based on the untested Munsell Declaration, Cox's rights would be compromised severely.

III. Verizon's New Language and New Claims Cannot Be Raised at this Point in an Arbitration.

The Munsell Declaration provides the sole factual predicate for Verizon's assertion that the Commission erred in finding that there is no feasible way to measure virtual FX traffic. Fantastically, Verizon uses this flawed factual predicate to attempt to introduce *new language* into this proceeding at this late date.[25] The parties made their final offers in this arbitration nearly nine months ago, when they were directed to submit their final proposed contracts.[26] The extreme tardiness of this proposed new language should disqualify it instantly. There is no basis

[23] *See Hagedorn*, 11 FCC Rcd at 1696.

[24] *See* Cox Objection at 12-16.

[25] *See* Verizon Petition at 22 & n.50 (describing new proposed contract language concerning traffic studies).

[26] *See Arbitration Order*, ¶ 15. Moreover, for the reasons described in the Cox Objection, parties were required to make their final substantive proposals long before the last submission of contract language. Cox Objection at 14-16.

in any rule germane to this arbitration that would permit the introduction or adoption of new proposed contract language introduced by a petition for reconsideration.

In addition, allowing Verizon to make a new contract proposal at this stage of the proceeding deprives Cox of the opportunity to present evidence and testimony in response or to cross-examine Mr. Munsell or any other Verizon witness about the asserted facts underlying the proposal. As Cox explained above, such a deprivation violates Cox's due process rights in this proceeding.[27] Moreover, even if Verizon's proposed new language were to be considered, it is clear that the proposal cannot be adopted. The only record support for the proposal would be the Munsell Declaration, which cannot be admitted. Thus the proposal must fail.

Similarly, Verizon has offered new objections to Cox language adopted by the Commission in its Order.[28] As Cox has noted in its Opposition, these objections are hopelessly late and entirely out of place at this stage of the proceeding.[29] Although the Cox-proposed contract language adopted by the Commission has remained basically unchanged throughout this proceeding, Verizon never has raised the objections now presented by the Verizon Petition. Again, Verizon has waited until well after the last possible moment to raise these legal claims. The claims are substantively meritless, but Cox has nevertheless has been deprived of the chance to provide testimony, to fully brief the issues, and to explain why the Commission's rules do not prohibit the language the Commission adopted. Having failed to raise these arguments before, Verizon has waived them and they should be stricken.

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[27] *See supra* note 24 and accompanying text.

[28] *See* Verizon Petition at 4, 5.

[29] Cox Opposition at 15.

IV. Verizon's Conduct Continues Its Pattern of Tactically Abusing the Commission's Procedural Rules to Gain Unfair Advantage.

Verizon continues its disturbing pattern of ignoring the Commission's procedural rules and treating this arbitration as if the only relevant parties are Verizon and the Commission. Repeatedly, Verizon has submitted contract language to the Commission that never appeared in negotiation or was shown to Cox.[30] Verizon's continued abuse of the Commission's rules and procedures to attempt to gain unfair procedural advantages no longer can be ignored. The Cox Objection requested that the Commission grant Cox summary judgement on the issues implicated by Verizon's submission of surprise language and that Verizon be assessed a forfeiture for its willful disregard of the Commission's rules. Cox hereby renews its request for sanctions, and requests that the Commission both dismiss the Verizon Petition and assess a forfeiture to Verizon to punish it for the wasted resources that its refusal to abide by the Commission's rules and procedures have caused to Cox and to the Commission.

V. Conclusion

For the reasons discussed above, Cox requests that the new matter presented in the Verizon Petition be stricken from the record; that the Verizon Petition be denied with respect to the issues it raises regarding the Commission's decision in Cox's favor on Issues I-4 and I-6 and

[30] In addition to those instances already noted by Cox, Verizon's July 10, 2002, letter proposing language to effectuate a recent Supreme Court decision was not provided to Cox before the letter was filed. See Letter from Kelly L. Faglioni, counsel for Verizon, to Jeffrey Dygert, Assistant Bureau Chief, Common Carrier Bureau, Federal Communications Commission, dated July 10, 2002.

the other contractual language challenged by Verizon; and that Verizon be assessed a forfeiture for its repeated violation of the Commission's rules and procedures in this proceeding.

Respectfully submitted,

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September 10, 2002

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a legal secretary at Dow, Lohnes & Albertson, PLLC do hereby certify that on this 10th day of September, 2002, copies of the foregoing Reply of Cox Virginia Telcom, Inc. were served as follows:

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